# SETTLEMENT PROVIDES GUIDANCE ON FIDUCIARY GOVERNANCE

NOVEMBER 10, 2014 DAVID WITZ LEAVE A COMMENT

Once the parties in complex litigation agree on the terms of a settlement, it is not common for a court to reject the settlement unless there is some profound error or injustice. As the the recent settlement in Goldenstar Inc. v. MassMutual Life Insurance Co. (see MassMutual Settles Excessive Fee Lawsuit) is very similar to past ERISA settlements including the recent one against ING (see ING Settles ERISA Class Action Lawsuit Over Revenue Sharing Practices) we anticipate the settlement will be approved. While a settlement holds no weight beyond the signatory parties, and here the class represented by the named plaintiffs, the terms of a settlement can be highly instructive to observers.

As such, a fiduciary should view this settlement as an opportunity to adjust internal policies, processes and procedures of their fiduciary governance as the issues raised in this case could affect how fiduciaries and service providers interact. For example, at the next fiduciary committee meeting or before signing a service agreement with any covered service provider ("CSP"), the following questions should be considered by the responsible plan fiduciary(ies)?

1. Has the CSP provided us a list of all available investment options?
2. Does our CSP provide a notice of any additions and deletion from the menu of options?
3. Does any CSP have the discretion to remove an investment from the menu without the prior authorization of the responsible plan fiduciary?
4. Has your CSP agreed not to delete, change or replace your investment options without providing the responsible fiduciary with 60 days advanced notice and their affirmative agreement to the change?
5. Has the CSP agreed to provide the responsible plan fiduciary with a disclosure that identifies the operating expense ratios for each investment alternative along with the revenue paid (revenue sharing) by the investment alternative to any CSP other than for investment management services?
6. Does the responsible plan fiduciary have the option to pay all plan fees except the operating expense ratio for investment management services directly from the corporate account versus deducting the fees from indirect fees passed to the CSP from the investment alternatives as revenue sharing?
7. Does the responsible plan fiduciary have the option of using investment alternatives that do not provide any indirect payments to the CSP?
8. Does the CSP have the discretion to unilaterally adjust their compensation?
9. Does the responsible plan fiduciary require a description of any previous or active law suits or settlements resulting from litigation filed against the CSP?

By addressing these questions, a fiduciary can make an informed decisions based upon a documented process that will go towards addressing the procedural prudence required by ERISA.